IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1964

Office-Supreme Court, U.S.
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No. 83

NORTHERN NATURAL GAS COMPANY and CITIES SERVICE GAS COMPANY, Both Corporations,
Appellants,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION and PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JOINT MOTION TO DISMISS OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

and

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

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MOTION TO DISMISS

Pursuant to Revised Rule 16 of this Court, Appellees State Corporation Commission of the State of Kansas[1] and Southwest Kansas Royalty Owners Association[2] move to dismiss these appeals because the judgments of the Kansas Supreme Court rest on adequate nonfederal bases, the

1. Hereinafter called Commission.
2. Hereinafter called Landowners.

federal questions sought to be reviewed were not timely or properly raised and no substantial federal question is presented.

OPINIONS BELOW

The opinions of the Kansas Supreme Court are reported at 192 Kan. 1, 386 P.2d 266[3] and 192 Kan. 29, 386 P.2d 288.[4]

JURISDICTION

Appellants attempt to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

Whether the judgments of the Kansas Supreme Court rest on adequate nonfederal grounds, whether the federal questions sought to be reviewed were timely and properly raised and whether any substantial federal question is presented.

STATEMENT OF THE CASE

These appeals involve gas proration orders issued by the Commission for the Kansas Hugoton Field. The orders are addressed and directed solely to producers—not purchasers—and fix the maximum amount of gas that can

3. Hereinafter called first opinion. Reproduced at Appendix A to Jurisdictional Statement.

4. Hereinafter called second opinion. Reproduced at Appendix B to Jurisdictional Statement.

be produced from each well. They are permissive orders and do not require any producer to produce any gas.

Each opinion of the Kansas Supreme Court disposed of several appeals, each of which involved several separate proceedings in the District Courts of Finney and Stevens Counties, Kansas. It will be necessary to outline the various proration orders involved in each proceeding in each District Court and the various judgments of the District Courts involved in the various appeals to the Kansas Supreme Court.

A. The First Opinion of the Kansas Supreme Court.

The first opinion of the Kansas Supreme Court disposed of Cases Nos. 41,515, 41,516, 41,555 and 41,556. Appellant Northern Natural Gas Company[5] has appealed these cases[6] (Appellant's Notice of Appeal to Supreme Court of the United States).

1. Cases Nos. 41,515 and 41,555.

Northern was not a party to these cases in the Trial Court and did not appeal the cases to the Supreme Court of Kansas (Nos. 41,515 and 41,516, Abstract of the Record, 337-8; Nos. 41,555 and 41,556, Appellants' Abstract of the Record, 181).

2. Cases Nos. 41,516 and 41,556.

Northern initiated these cases in the Finney County Court to review various proration orders and a general order. The Trial Court set aside the general order and set aside the Commission's proration orders and substi-

5. Hereinafter called Northern.

6. Appellant Cities Service Gas Company (hereinafter called Cities) has not appealed these cases to this Court.

tuted its own proration orders (Nos. 41,515 and 41,516, Abstract of the Record, 351-3; Nos. 41,555 and 41,556, Appellants' Abstract of the Record, 178-80).

The Supreme Court of Kansas reversed the judgments of the Finney County Court because, among other grounds:

(a) The Trial Court did not have jurisdiction to review the proration orders issued prior to November, 1957, because Northern had not filed petitions for rehearing with the Commission, as required by the Kansas Judicial Review Act[7] (192 Kan. at 10-2, 386 P.2d at 275-6; Appendix A to Jurisdictional Statement, A 14-8).

(b) The Trial Court did not have jurisdiction to review the general order because the attempted review proceeding was premature under the Kansas Judicial Review Act[8] (192 Kan. at 12-4, 386 P.2d at 276-7; Appendix A to Jurisdictional Statement, A 18-9).

(c) As to all proration orders, the Trial Court exceeded its authority under the Kansas Judicial Review Act,[9] by promulgating its own proration orders, rather than judicially reviewing the Commission's proration orders (192 Kan. at 14-6, 386 P.2d at 277-8; Appendix A to Jurisdictional Statement, A 20-3).

(d) The Trial Court erred in failing to make findings of fact and conclusions of law, as required by G.S. Kan., 60-2921 (192 Kan. at 16-7, 386 P.2d at 278-9; Appendix A to Jurisdictional Statement, A 23-5).

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7. G.S. Kan., 55-606.

8. *Ibid.*

9. *Ibid.*

B. The Second Opinion of the Kansas Supreme Court.

The second opinion of the Kansas Supreme Court disposed of Cases Nos. 42,175, 42,176, 42,185 and 42,230 (consolidated by the Kansas Supreme Court)[10] and 42,038. Appellants have appealed these cases (Appellants' Notices of Appeal).

1. Consolidated Cases.

These cases were initiated by Appellants and others in the Finney County Court to review various proration orders. The Kansas Supreme Court held that the Finney County Court lacked jurisdiction, under the Kansas Judicial Review Act,[11] to review such proration orders and reversed with instructions to dismiss (192 Kan. at 32-5, 386 P.2d at 290-2; Appendix F to Jurisdictional Statement, A 81-3).

2. Case No. 42,038.

The Landowners initiated this case in the Stevens County Court to review the same proration orders involved in the consolidated cases. Prior to trial, the Stevens County Court was informed that Appellants had, after the commencement of the Stevens County proceedings, filed petitions to review the same proration orders in the Finney County Court. The Stevens County Court ordered Appellants to present their grievances concerning such proration orders to the Stevens County Court (No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 239-41).

Appellants refused to follow the Court's order and did not participate in the trial. After that Court entered judg-

10. Hereinafter called consolidated cases.

11. G.S. Kan., 55-606.

ment. Appellants appealed and attempted to interject federal questions, for the first time, in the Kansas Supreme Court (*supra* at 243-5, 250-4, 316-8, 329-32).

ARGUMENT

I. The Judgments of the Kansas Supreme Court Rest on Adequate Nonfederal Bases.

Northern was not a party to Cases Nos. 41,515 and 41,555 and did not appeal the judgments of the Trial Court to the Kansas Supreme Court. It has no standing to appeal such cases to this Court.

In Cases Nos. 41,515, 41,516 and the consolidated cases, the Supreme Court of Kansas held that, under the Kansas Judicial Review Act,[12] the Trial Court did not have jurisdiction. This is clearly a nonfederal ground.

The Kansas Supreme Court also held, in Cases Nos. 41,515, 41,516, 41,555 and 41,556, that the Trial Court exceeded its authority, under the Kansas Judicial Review Act,[13] when it promulgated proration orders, rather than judicially reviewing the Commission's proration orders and erred in not making findings of fact and conclusions of law, as required by Kansas law.[14] Again, clear-cut nonfederal grounds.

This Court does not review state court judgments based on adequate nonfederal grounds:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on inde-

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12. G. S. Kan., 55-606.

13. *Ibid.*

14. G.S. Kan., 60-2921.

> pendent and adequate state grounds, notwithstanding the copresence of federal grounds [Citations omitted]." *Fay* v. *Noia*, 372 U.S. 391, 428.

Other cases recognizing this rule are *Buck* v. *California*, 343 U.S. 99; *Nickel* v. *Cole*, 256 U.S. 222, 225; and cases cited therein.

In Case No. 42,038, Appellants did not raise any federal questions in the Trial Court. The Kansas Supreme Court has an "iron clad rule"[15] that it does not consider questions that were not presented to the Trial Court.[16]

Since Appellants did not raise any federal questions in the Trial Court, it was precluded from raising them in the Kansas Supreme Court.

This Court does not consider federal questions that were not properly raised in the lower courts.

In *Puget Sound Power & L. Co.* v. *King County*, 264 U.S. 22, this Court held that:

> "No evidence appears in the record that it raised an objection based on the 14th Amendment to the Federal Constitution or any other federal question in the superior court or supreme court. It is too late . . . to raise it in the assignment of errors in this court, even though it joins in the assignment with the street railway company, which did raise such an objection in all the courts." 264 U.S. at 25.

In *Edelman* v. *California*, 344 U.S. 357, this Court refused to review federal questions that had not been raised in the state court in the manner required by state law:

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15. *Karle* v. *Board of County Commissioners*, 188 Kan. 800, 805, 366 P.2d 241, 245.

16. *Ibid.*; *Krentz* v. *Haney*, 187 Kan. 428, 357 P.2d 793.

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of State Law. [Citations omitted] Non-compliance with such local law can thus be an adequate state ground for a decision below." 344 U.S. at 358.

The judgments of the Supreme Court of Kansas are based on the adequate nonfederal grounds that the Trial Court lacked jurisdiction, exceeded its statutory authority and failed to follow state trial procedure; and that Appellants failed to timely and properly raise any federal questions in the lower courts. Any of these nonfederal grounds are sufficient to sustain the judgments of the Kansas Supreme Court. Appellants' appeals should be dismissed.

II. These Proration Orders Do Not Violate the Federal Constitution or the Natural Gas Act.

The above discussion demonstrates that no federal questions are properly presented and these appeals should be disposed of accordingly. However, due to the fact that imaginative counsel, aided by a voluminous record, have distorted these appeals to the point that the Kansas Supreme Court and the Commission have been accused of engaging in an "unlawful scheme",[17] we feel compelled to briefly mention the merits of these appeals.

Cases Nos. 41,515, 41,516, 41,555 and 41,556 were decided under a statute[18] that was "repealed"[19] in 1959. We submit that a decision of a state court interpreting a state

17. Jurisdictional Statement, 35

18. G.S. Kan., 55-703.

19. Laws of Kansas, 1959, ch. 237, sec. 3.

statute that has been repealed does not present a substantial federal question.

Appellants contend that these proration orders violate the Commerce Clause of the Federal Constitution. This contention was rejected by this court in *Cities Service Gas Company* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. There the Oklahoma Commission ordered an interstate purchaser to buy gas and fixed the price to be paid. In that case, Cities Service also contended that such order violated the commerce clause.

> The Court disposed of the argument in short order; "It is now well settled that the state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce." 340 U.S. at 186.

We have some difficulty understanding Appellants' contention that these proration orders invade the jurisdiction of the Federal Power Commission. If they mean that the Federal Power Commission has the exclusive power to prorate gas for all states, the argument is without any merit.

The Federal Power Commission recognizes that it has no such authority:

> '[petitioner's] contentions in effect are that this Commission should perform the functions of prorating takes and adjusting correlative private rights of producers within a field; matters which it seems to us should be decided by the Commonwealth of Kentucky. . . .' *Reserve Oil and Gas Co., et al.*, Docket Nos. G-4720, *et al.*, issued April 2, 1964.[20]

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20. Rehearing has since been granted on other issues.

This position is in accord with the decisions of this Court.

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this Court noted that:

> "The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interest of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas." (Footnotes omitted). 337 U.S. at 509-13.

In the footnote to the above quotation, this Court said, "See, for example, Kansas Gen. Stat. C. 55, §§ 701-713. . . ."[21]

Appellants seek to evade the plain Congressional mandate concerning state control of production and the decisions of this Court by asserting that the present appeals are virtually identical to *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84. We submit that such case does not abrogate the power of a state to prorate gas.

This Court very carefully noted in *Northern*, *supra*, that:

> "The danger of interference with the federal regulatory scheme arises *because* these orders are unmistakably and unambiguously directed at purchasers who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output

21. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513, n. 17.

of thousands of natural gas wells within the State, cf. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340—*a task which would otherwise presumably be the State Commission's.*" (Emphasis supplied). 372 U.S. at 920.

After reviewing many of its decisions interpreting the National Gas Act, the Court concluded that:

> "Thus our cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesalers for resale, and those aimed at producers and production." 372 U.S. at 94.

After twice pointing out that the order involved in *Northern, supra,* was invalid because it attempted to regulate purchasers, the Court noted that:

> "The State does not, however, appear to be without alternative means of checking waste and disproportionate or discriminatory taking." 372 U.S. at 94.

In the footnote to this quotation, this Court noted that "the availability of regulatory alternatives, particularly in the form of proration and similar orders directed at producers, has been much discussed."[22]

In the same note to *Northern, supra,* the Court also directed attention to the following portion of *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602-3:

> "That does not mean that the part of §(b) which provides that the Act shall not apply to the production of gathering of natural gas is given no meaning. Certainly that provision precludes the Commission from

22. *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, 94, n. 17.

any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has *no* control over the drilling and spacing of wells *and the like*." (Emphasis supplied).

The great pains taken by this Court in *Northern, supra,* to remove any fears that its decision was meant to curtail state regulatory powers,[23] cannot be minimized. It is in harmony with the previous pronouncements of this Court that the "Act had . . . no purpose or effect to cut down state power"[24] and the well known Congressional intent that the Act "takes no authority from State Commissions as it is so drawn as to complement and in no manner usurp State regulatory authority."[25]

Proration orders have always been the backbone of state regulation. Many states were prorating gas when the Natural Gas Act was passed.[26] It is inconceivable to think that Congress intended to transfer such power to the Federal Power Commission.

We find it difficult to believe that Appellants are now contending that the state has no power to prorate gas. In the lower courts, they contended that the state had such power. Their only complaint was that the Commission refused to allow a combination of privately owned pipeline companies to determine the amount of the allow-

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23. See dissenting opinion by Mr. Justice Harlan (372 U.S. 84, 98).

24. *Panhandle Eastern Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 517.

25. H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 2.

26. 5 Summers, Oil and Gas, §§921-44; Murphy, Conservation of Oil & Gas (1948).

ables, without regard to waste, correlative rights, market demand or the interest of the public.[27]

Appellants control slightly more than 60% of the field's deliverability.[28] They want the power to set allowables because they are the majority. If given this power, they can substantially curtail or increase production as suits their desires, even if their accelerated rate of production would permanently damage the producing formation.

Appellants have paraded horribles before the Court to such an extent that it appears that utter chaos will occur if these proration orders are allowed to stand. For eight (8) years, Appellants have been predicting that the "whole comprehensive scheme of federal regulation. . ." would become a shambles and fail[29] if the Commission issued these allowable orders. The Commission issued these orders eight (8) years ago. There has been no conflict between state agencies or with the Federal Power Commission.

It would be foolish to deny that these proration orders may have some residual effect on interstate purchasers, as will any other conservation order, or safety regulation, or workmen's compensation law, or severance tax, etc. This, however, does not mean that a state is powerless to prorate gas, any more than it means that a state cannot levy a severance tax.

These appeals do not present any substantial federal questions and should be dismissed.

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27. 192 Kan. 1, 22-3, 386 P.2d 266, 282-3, Appendix A to Jurisdictional Statement, 32-3.

28. No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 102.

29. Jurisdictional Statement, 32.

CONCLUSION

The decisions of the Kansas Supreme Court rest on adequate nonfederal grounds. Appellants failed to timely and properly raise any federal questions. In any event, such judgments do not involve a substantial federal question.

Appellees' motion should be granted and the appeals dismissed.

Respectfully submitted,

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